

28 February 1977

OGC Has Reviewed

STATINTL

MEMORANDUM FOR: [REDACTED]

FROM :

[REDACTED]
Office of General Counsel

SUBJECT : GEHA--Regulation by the D.C. and Virginia
Insurance Commissions

1. Issue Presented: Is the Government Employees Health Association (GEHA) subject to the regulatory and filing requirements of the D.C. or Virginia Insurance Commissions.

2. Conclusion: No. GEHA is not engaged in "insurance," but is instead a non-profit, service-oriented consumer organization chartered on 29 June 1948 (charter amended 16 September 1958) as a charitable corporation pursuant to Title 29, Chapter 6, of the D.C. Code. As such, it is not required to register with the D.C. or Virginia Insurance Commissioners, nor to file any of its records with them.

3. Background. This problem has arisen several times in the last twenty-five years, each time without any official determination on the matter. As early as 1951, the Agency was corresponding with the D.C. Superintendent of Insurance in an effort to obtain some sort of official pronouncement, but nothing in our files indicates any action was ever taken. The problem resurfaced again in 1957 (OGC/B-8053), then again in 1958 (OGC/B-8360), each time without resolution.

4. FPM Supplement 890-1 (Inst. 39, 6 February 1976) precisely describes at subchapter 52-3 and -4 the respective duties of the federal agencies and the insurance carrier in health associations such as GEHA. GEHA--for security reasons--has been assigned by the insurance carrier to process claims and perform other administrative duties which would normally be performed by the insurance carrier. GEHA does not, however, encroach upon the carrier's legal and contractual responsibility to insure against risk, and this is the deciding factor in assessing whether or not GEHA is subject to regulation as an insurance company.

5. District of Columbia. The regulatory requirements under which insurance companies doing business in the District must

operate are found primarily at Title 35 of the D.C. Code, sections 102-105, 202 and 712. All of these provisions imply that GEHA is not intended to be subject to their coverage. Section 102 refers to the issuance of policies; section 105 refers to premium receipts and losses paid; and section 202 refers to the "payment of indemnity." These are the functions of the insurance carrier, not of GEHA. The oft-cited case of Metropolitan Police Retiring Ass'n., Inc v. Tobriner, 306 F. 2d 775 (D.C. Cir. 1962), dealt with an association which invested members' funds and then repaid them with interest upon retirement. The court held that such an association was not engaged in the insurance business.

Such a plan seems not to have been within the contemplation of Congress; and the legislation is so elaborate that we are not inclined to strain its coverage to include an activity left uncovered by the ordinary meaning of the language used. Had a non-profit relief or retirement plan of this simple and unambitious character been deemed to be the business of insurance, we feel sure we could find in the numerous Code provisions a more explicit indication to that effect. Id. at 777-8.

The court then went on to explain what constitutes engaging in the insurance business.

[I]nsurance involves essentially a contractual security against anticipated loss.... [Insurance companies] assume a separateness of identity, diversity of ownership, public solicitation of business, and probable conflict of interest between insurer and insured, necessitating regulation for the latter's protection.... The absence of a profit motive and the facts that the Association possesses a representative government and engages in no solicitation of the public, add some though not controlling support to the view that its activities are not within the scope of a statute primarily designed to protect the insured vis-a-vis the insurer. Id. at 777-8.

As will be noted from the above-cited passages, the absence of a profit motive and the lack of a conflict of interest between the association and the insured are important factors in determining if an association is engaged in the insurance business. The decisive factor, however, is that explained in Jordan v. Group Health Ass'n., 107 F. 2d 239 (D.C. Cir. 1939).

[Insurance associations] are concerned primarily, if not exclusively, with risk and the consequences of its descent, not with service or its extension in kind, quantity or distribution. Id. at 247.

"Insurance," then, involves the distribution of risk, and to be engaged in insurance an association must contract to assume that risk for the insured. Group Health Association was held to be a consumer corporation rather than an insurance company.

Group Health is in fact and in function a consumer cooperative. The functions of such an organization are not identical with those of insurance or indemnity companies... The cooperative is concerned principally with getting service rendered to its members and doing so at lower prices made possible by quantity purchasing and economies in operation. Id. at 247.

6. Additionally, it should be noted that GEHA is in all probability a "relief association, not conducted for profit, composed solely of... employees of any... branch of the United States government service...." D.C. Code, section 35-202. As such, it is exempted from the provisions of the D.C. Code which regulate insurance companies.

7. On 31 January 1977, I spoke on the telephone with Mr. Lee McLellan of the Accident and Health Division of the D.C. Insurance Department (629-4514). He assured me that the D.C. Insurance Department had absolutely no intention--or jurisdiction--to oversee the operations of any CIA employees health insurance associations. His reasoning followed the same general principles set forth in Tobriner and Jordan, supra, and he cited the statutory exemption at D.C. Code, section 35-202.

8. Virginia. The insurance laws of Virginia generally recognize the same distinctions as those of the District of Columbia, with the notable exception of a provision exempting Federal Government employee associations. There is none in the Virginia Code. The law as stated in Jordan and Tobriner, supra, is not looked upon with disfavor. Relevant Virginia statutory law is found in Title 38.1 of the Virginia Code, sections 1-5, 85-98.1, 159-178, and 342.1. Although there is no Virginia case law dealing with the question presently before us, it is reasonable to assume that Virginia would apply the generally-accepted standard found at 44 C.J.S., Insurance, and applied in Jordan and Tobriner, supra.

Whether a company is engaged in the insurance business depends...on the character of the business that it transacts, and whether that business constitutes an insurance business subject to regulation as such is determined by the usual course of the business, and whether the assumption of a risk, or some other matter to which it is related, is the principal object and purpose of the business. 44 C.J.S., Insurance §59 (1945).

See also State ex rel. Farmer v. Monsanto Co., 517 S.W. 2d 129 (Mo. 1974), where a corporation acting openly as the insurer of its employees was held not to be in the insurance business for tax and licensing purposes. Additional support was given to this viewpoint by a telephone conversation with Mr. John Mardigian of the Virginia State Corporation Commission's Department of Insurance. I spoke with Mr. Mardigian (804-786-7691) in Richmond on 31 January 1977, and he assured me that the state of Virginia's position is identical to that of the District: it has neither the jurisdiction nor the inclination to regulate GEHA.

9. Summary. GEHA is not subject to the regulatory authority of the D.C. Government by virtue of the exemption for U.S. Government employee associations found at section 35-202 of the D.C. Code. Furthermore, GEHA is not subject to the regulatory authority of either the D.C. Government or the state of Virginia because GEHA is not engaged in the insurance business. GEHA cannot be said to be engaging in the insurance business for the following reasons:

- (a) GEHA is operated solely for the benefit of its members;
- (b) GEHA is a consumer organization operated by its members;
- (c) GEHA does not engage in public solicitation to sell insurance;
- (d) GEHA is a non-profit, service-oriented association; and most importantly,
- (e) GEHA does not assume any insurance risks for its members. That role is performed exclusively by the insurance carrier.

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